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Richard P. Alexander

Sheldon Portman

# Grand Jury Indictment Versus Prosecution by Information—An Equal Protection-Due Process Issue

*By* RICHARD P. ALEXANDER* *and* SHELDON PORTMAN**

FOLLOWING almost two hundred years of continuous and unwavering support of the institution we know as the grand jury, the United States Supreme Court recently announced an opinion which suggests the first leak in the dike of its regard for that once exalted institution. Speaking for the six-member majority in *United States v. Dionisio*,[1] Justice Stewart acknowledged that "[t]he grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor . . . ."[2] Even stronger expressions of concern over the continuing viability of the grand jury are found in the dissenting opinions of Justices Douglas and Marshall. Justice Douglas observed: "It is, indeed, common knowledge that the Grand Jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."[3] Justice Marshall emphasized the dangers facing grand jury independence as compounded by the *Dionisio* decision itself.[4]

* B.A., Ohio Wesleyan University, 1966; J.D., University of Chicago, 1969; Member of Michigan Bar and California Bar; Member, Board of Governors, California Attorneys for Criminal Justice; Member of the firm of Boccardo, Blum, Lull, Niland, Teerlink & Bell of San Francisco.

** B.A., Kent State University, 1952; LL.B., (Case) Western Reserve University School of Law, 1954; Member of Ohio Bar and California Bar; admitted to practice before the Supreme Court of the United States; Public Defender, Santa Clara County, California; Director, National Legal Aid and Defense Association and Western Regional Defender Association; Vice-Chairman of the Defense Services Committee of the ABA Section on Criminal Law; Past-president, California Public Defenders Association; Member of Board of Governors, California Attorneys for Criminal Justice.

1. 410 U.S. 1 (1973).
2. *Id.* at 17.
3. *Id.* at 23.
4. *Id.* at 45-47.

These comments are significant not only because of their source but also because they were not germane to the resolution of the problem before the Court. The volunteered concern of some of the highest judicial officers of our land over the method by which criminal prosecutions are initiated indicates the need for careful scrutiny of the grand jury process, particularly in the light of modern constitutional doctrines. Accordingly, this article presents a discussion of an important due process-equal protection issue inherent in the two contrasting felony-charging procedures authorized under Article 1, Section 8 of the California Constitution, prosecution by information following a preliminary examination or by grand jury indictment. For a full understanding of this problem, the discussion will begin with a review of the origin of the two procedures.

## Historical Introduction

### Origin of the Grand Jury System

Historically, the grand jury has been looked upon as a suitable device for protecting the weak or unpopular from judicial harassment or politically motivated prosecutions. The grand jury is supposed to function as a body of neighbors who aid the state in bringing criminals to justice while protecting the innocent from unjust accusation.[5] However, both the grand jury and the criminal information have ceased to fulfill these original role-obligations and have become increasingly subject to incapacitating manipulation and abuse. All of the major recent studies conclude that the grand jury has become, in effect, a rubber stamp of the prosecutor and not the check on his power that it is required to be.[6]

The origins of the institution of the grand jury are obscure. In some form it was found early in all the Teutonic peoples, including the Anglo-Saxons before the Norman conquest.[7] Forms of the grand jury have also been traced in Scandinavian countries where jurors came to determine both law and fact.[8] The grand jury originated in Anglo-American law with the summoning of a group of townspeople before a public official to answer questions under oath, a system of inquiry used for such administrative purposes as the compilation of

5. *See* Wood v. Georgia, 370 U.S. 375, 390 (1962).

6. *E.g.*, Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101, 363 (1931) [hereinafter cited as Morse].

7. *Id.* at 103.

8. *Id.* at 105-06.

the Domesday Book of William the Conqueror.[9]

In 1166, the crown first established the criminal grand jury, a body of twelve knights, or other freemen whose function was to accuse those who, according to public knowledge, had committed crimes.[10] The purpose was to give to the central government the benefit of local knowledge in the apprehension of those who violated the king's peace. Witnesses as such were not heard before this body. The use of accusing juries provided for in the Assizes of Clarendon (1166) and Northhampton (1176), closely resembles the modern grand jury in personnel, duties and powers.[11] During the thirteenth and early part of the fourteenth centuries, the grand jurors themselves served as petit jurors in the same matters in which they presented indictments.[12] Not until the eventual separation of the grand jury and petit jury did the function of accusation become clearly defined and did crown witnesses come to be examined in secret before the grand jury.[13] By the time of the appearance of *le graunde inquest* in 1368, the grand jury had acquired the powers and duties of the present-day grand jury and it has not changed materially since that time.[14] Even as it was still developing, prior to *le graunde inquest*, the grand jury was becoming lame. As reported by Dean Morse:

> Holdsworth points out that the sheriff's tourn, with its presenting jury, became so powerful in the twelfth century that it aroused the suspicion of the king who ordered an inquest of the sheriffs in 1170. To check the power of the sheriff's tourn, the office of the coroner was created.[15]

**Origin of the System of Prosecution by Information**

Parallel to the development of the grand jury was the development of the criminal information. The use of the criminal information dates at least from the time of Edward I, 1272-1307.[16] Other evi-

9. *Id.* at 106-07. The root origin of the English jury system in its present form is generally accepted as coming from the Carlovingian inquisition introduced in England by the Norman kings. *Id.* at 103-04; *see* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312 (1922); J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 51 (1898); 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 140-42 (2d ed. 1923). *See generally* Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961).

10. L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL, 137-39 (1947).

11. *See* Morse, *supra* note 6, at 112.

12. *Id.* at 114.

13. *Id.* at 116-17.

14. *Id.* at 118.

15. *Id.* at 112-13.

16. *Id.* at 118.

dence tracing the origins of the criminal information makes clear that its history and use in certain times and cases is almost as old as that of the indictment.[17] Like its counterpart, the grand jury, the criminal information was also subject to manipulation and abuse from early times. As stated by Dean Morse:

> The king's council came to initiate criminal prosecutions based on informations not only of the king, but also of private persons, and as a result, there were many false and malicious prosecutions started and then dropped. The procedure . . . came to be abused in that it was used for political prosecutions . . . . To check private persons from using information to initiate false and malicious prosecutions, a statute was passed in 1692 [4 W. & M., c.18] which required that the informations of private citizens should be approved of by the court . . . .[18]

Both the grand jury and the criminal information found their way to America, and both are used here today.[19]

## Criticism of the Grand Jury System

In this country numerous studies undertaken to assess the efficacy of the grand jury have all concluded that it is no longer effective in protecting individuals against arbitrary prosecutions, and that it no longer exercises the independent judgment required by due process. The landmark study in this century was conducted by Dean Wayne Morse of the University of Oregon Law School. After an exhaustive study of 7,414 indictments and extensive questionnaires sent to prosecutors and judges, Dean Morse concluded:

> Grand juries are likely to be a fifth wheel in the administration of criminal justice in that they tend to stamp with approval, and often uncritically, the wishes of the prosecuting attorney. At best the grand jury tends to duplicate the work of the committing magistrate and prosecutor.[20]

Dean Morse found that in only 5.15 percent of the cases initiated by the prosecutor in which he expressed an opinion was there a disagreement between the opinion of the prosecutors and the grand jury dispositions.[21] Similarly, the National Commission on Law Observance and Enforcement concluded:

17. *See* 9 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 236 (1922); 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW IN ENGLAND 294-95 (1883).

18. Morse, *supra* note 6, at 119-20 (footnotes omitted); *accord*, 1 J. STEPHEN, HISTORY OF THE COMMON LAW IN ENGLAND 296 (1883).

19. In England grand juries ceased to sit after 1917. Younger, *The Grand Jury Under Attack III*, 46 J. CRIM. L.C. & P.S. 214 (1955).

20. Morse, *supra* note 6, at 363.

21. *Id.* at 151.

> The grand jury usually degenerates into a rubber stamp wielded by the prosecuting officer according to the dictates of his own sense of propriety and justice. [The grand jury] has ceased to perform or be needed for the function for which it was established.[22]

These findings are reinforced by Professor Moley who determined that the prosecutor "seems to dominate the grand jury to such a degree that its actions are in reality his own . . . ."[23]

Most recently, Weinberg and Weinberg, in discussing preliminary hearings in federal courts, concluded with respect to grand juries:

> The grand jury is not a proper body to reach an "independent judicial determination" of probable cause. Its determination is unlikely to be "judicial" because it is composed of laymen, whose sole guidance on legal questions will normally come from the prosecutor. Its determination is also unlikely to be "independent" in most cases because, in practice, the prosecutor's influence is usually controlling.[24]

The Second Circuit recently described the grand jury as basically "a law enforcement agency"[25]—a conclusion supported by numerous studies.[26] Most recently William J. Campbell, Senior Judge, United States District Court for the Northern District of Illinois, recommended that the grand jury be completely eliminated and replaced by a procedure encompassing an advisory preliminary examination before a judicial officer to determine probable cause.[27]

**Nature and Function of the Preliminary Examination**

The due process clauses of both the Fourteenth Amendment[28] and the California Constitution[29] require that the state adopt a procedure which will insure that no person is required to stand trial at the

22. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON PROSECUTION 124 (1931).

23. Moley, *The Initiation of Criminal Prosecutions by Indictment or Information*, 29 MICH. L. REV. 403, 430 (1931).

24. Weinberg & Weinberg, *The Congressional Invitation to Avoid the Preliminary Hearing: An Analysis of Section 303 of the Federal Magistrates Act of 1968*, 67 MICH. L. REV. 1361, 1380 (1969).

25. United States v. Cleary, 265 F.2d 459, 461 (2d Cir. 1959).

26. *See, e.g.*, Dession, *From Indictment to Information—Implications of the Shift*, 42 YALE L.J. 163 (1932); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1171 (1960); Meshbesher, *Right to Counsel Before Grand Jury*, 41 F.R.D. 189 (1967); 39 CALIF. L. REV. 573, 575 (1951).

27. Campbell, *Eliminate the Grand Jury*, 64 J. OF CRIM. L. & CRIM. 174 (1973).

28. U.S. CONST. Amend. XIV.

29. CAL. CONST. art. 1, § 13.

whim or caprice of the prosecuting attorney.[30] The form is not mandated to be either a grand jury or a preliminary examination[31] but rather a procedure which *effectively* secures to the accused the substance of due process: an independent judicial determination of the reasonableness of the charge.[32]

Two methods for initiating a felony prosecution are authorized under the California Constitution in the following language:

> Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or by indictment, with or without such examination and commitment, as may be prescribed by law.[33]

The California Penal Code authorizes prosecution by either information or indictment[34] with the overwhelming majority of all criminal prosecutions being initiated by information pursuant to Penal Code Section 858.[35] Under this procedure, an accused is entitled to a preliminary examination before a magistrate[36] and is afforded the right to representation by counsel[37] and the right to present witnesses in his own behalf.[38]

The California Supreme Court has described these provisions as being declaratory of fundamental procedural rights and has stressed the earlier view of the United States Supreme Court that the preliminary examination process " 'carefully considers and guards the substantial interest of the prisoner' and thus constitutes due process of law."[39]

In *People v. Elliot*[40] the purpose of the preliminary examination process was described in the following language:

> The preliminary examination is not merely a pre-trial hearing. "The purpose of the preliminary hearing is to weed out groundless or unsupported charges of grave offenses, and to relieve the accused of the degradation and the expense of a criminal trial. Many an unjustifiable prosecution is stopped at that point, where

30. *See* Hurtado v. California, 110 U.S. 516 (1884).
31. *See id.* at 535; Woon v. Oregon, 229 U.S. 586, 590 (1913).
32. *See* Hurtado v. California, 110 U.S. 516, 536-38 (1884).
33. CAL. CONST. art. 1, § 8.
34. CAL. PEN. CODE § 737 (West 1970).
35. *Id.* § 858. See text accompanying note 96 *supra.*
36. *Id.* §§ 859a, 860.
37. *Id.* § 859.
38. *Id.* § 866.
39. Jennings v. Superior Court, 66 Cal. 2d 867, 875, 428 P.2d 304, 309, 59 Cal. Rptr. 440, 445 (1967), *quoting* Hurtado v. California, 110 U.S. 516, 538 (1884).
40. 54 Cal. 2d 498, 354 P.2d 225, 6 Cal. Rptr. 753 (1960).

the lack of probable cause is clearly disclosed."[41]

In *Jennings v. Superior Court*[42] this constitutional and statutory purpose was held to require that the defendant "be permitted, if he chooses, to elicit testimony or introduce evidence tending to overcome the prosecution's case or establish an affirmative defense."[43]

The critical nature of the preliminary hearing and its constitutional concomitant assistance of counsel, during that stage were established recently in *Coleman v. Alabama.*[44] Although Alabama law forbade the use at trial of anything that occurred at a preliminary hearing held without counsel, nevertheless, the Court ruled:

> [I]t does not follow that the Alabama preliminary hearing is not a "critical stage" of the State's criminal process. The determination whether the hearing is a "critical stage" requiring the provision of counsel depends, as noted, upon an analysis "whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice." *United States v. Wade*, [388 U.S. 218, 227 (1967)]. Plainly the guiding hand of counsel at the preliminary hearing is essential to protect the indigent accused against an erroneous or improper prosecution. First, the lawyer's skilled examination and cross-examination of witnesses may expose fatal weaknesses in the State's case that may lead the magistrate to refuse to bind the accused over. Second, in any event, the skilled interrogation of witnesses by an experienced lawyer can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial. Third, trained counsel can more effectively discover the case the State has against his client and make possible the preparation of a proper defense to meet that case at the trial. Fourth, counsel can also be influential at the preliminary hearing in making effective arguments for the accused on such matters as the necessity for an early psychiatric examination or bail.
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> The inability of the indigent accused on his own to realize these advantages of a lawyer's assistance compels the conclusion that the Alabama preliminary hearing is a "critical stage" of the State's criminal process at which the accused is "as much entitled to such aid [of counsel] . . . as at the trial itself." Powell v. Alabama, [287 U.S. 45, 57 (1932)].[45]

Of equal, if not greater, import to our citizens is the fact that a preliminary examination provides them protection from the ignominy and expense of going to trial unless there has been an evidentiary hearing and a holding that sufficient evidence exists to justify trial.

41. *Id.* at 504, 354 P.2d at 229, 6 Cal. Rptr. at 757, *quoting* Jaffe v. Stone, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941).

42. 66 Cal. 2d 867, 428 P.2d 304, 59 Cal. Rptr. 440 (1967).

43. *Id.* at 880, 428 P.2d at 313, 59 Cal. Rptr. at 449.

44. 399 U.S. 1 (1970).

45. *Id.* at 9-10.

## Prosecution by Information and Indictment: A Comparison

In a prosecution by information, California law requires that there be an independent *evidentiary* determination of probable cause in an adversary proceeding before trial,[46] but no equivalent right is granted to an accused who is prosecuted by grand jury indictment. Where an indictment is issued by the grand jury, the accused is not afforded the safeguard of an independent judicial evaluation of the evidence.

Indictment by grand jury affords none of the fundamental rights provided in a preliminary examination.[47] Unless he is called as a witness, the defendant has neither the right to appear and present evidence to the grand jury nor to confront witnesses against him.[48] Only the district attorney, the attorney general or special counsel may appear and present evidence.[49] Even if called as a witness, a defendant may not have the assistance of counsel to advise him.[50] Although the grand jury may require the district attorney to issue process for defense witnesses when it "has reason to believe that such evidence exists,"[51] this provision is of little practical value since the proceedings are held in secret with no notice to a defendant. Furthermore, as indicated by the opening statement of Penal Code Section 939.7, the grand jury is "not required to hear evidence for the defendant," and thus may reject such evidence at the very outset.[52] Without hearing the evidence in the first place, the opportunity to determine whether evidence exists to "explain away the charge" is in effect foreclosed, virtually assuring the finding of an indictment under Penal Code Section 939.8 on the basis of "unexplained or uncontradicted" evidence.[53]

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46. CAL. PEN. CODE § 871 (West 1970).

47. See text accompanying notes 24-34 *supra.*

48. *See* People v. Goldenson, 76 Cal. 328, 345, 19 P. 161, 168-69 (1888); People v. Collins, 60 Cal. App. 263, 269, 212 P. 701, 704 (1922). CAL. PEN. CODE § 939.7 (West 1970) provides: "The grand jury is not required to hear evidence for the defendant, but it shall weigh all the evidence submitted to it, and when it has reason to believe that other evidence within its reach will explain away the charge, it shall order the evidence to be produced, and for that purpose may require the district attorney to issue process for the witnesses."

49. CAL. PENAL CODE §§ 923, 935, 936 (West 1970).

50. *Id.* § 939.

51. *Id.* § 939.7.

52. *Id.*

53. *Id.* § 939.8. Little wonder therefore that a survey conducted in 1955 showed that of 289 indictments sought by district attorneys, 272 true bills were returned, or 94.1 percent. Note, *Some Aspects of the California Grand Jury System,* 8 STAN. L. REV. 631, 654 (1956). This is consistent with the criticism that the grand jury system

In support of its finding, the grand jury is required to "receive none but evidence that would be admissible over objection at the trial of a criminal action . . . . "[54] In determining what is admissible evidence, the grand jury may ask for the advice of the judge or district attorney. However, unless such advice is requested, the judge is excluded from the session,[55] leaving the jury to rely upon the prosecutor to advise it.[56] These contradictions have been the object of criticism by one commentator who has observed:

> When the function of indictment . . . is mated with the responsibility of determining the character of the evidence that supports it, and with the right to exclude all evidence which *could* explain or contradict, the result is not proper. In short, it is both derogatory of the jury's basic purpose and devoid of fairness.[57]

Thus, a defendant who is subject to indictment by grand jury is denied the right to present evidence to explain or contradict the charge, has no right to appear or to have the assistance of counsel, and may not

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is merely a rubber stamp. *E.g.*, Morse, *supra* note 6, at 363.

On the other hand, one cannot conclude that the preliminary examination screening rate is much better. A recent study in Los Angeles indicates that roughly 90 percent of the preliminary examinations resulted in holding orders. Graham & Letwin, *The Preliminary Hearings in Los Angeles: Some Field Findings and Legal Policy Observations*, 18 U.C.L.A.L. REV. 636, 723-24 (1971). The authors also report that in 1966, 30 percent of these dismissals failed to terminate the prosecutions, and in 1967, the figure was 25 percent. *Id.* at 729.

54. CAL. PEN. CODE § 939.6(b) (West 1970).

55. *Id.*

56. In McFarland v. Superior Court, 88 Cal. App. 2d 153, 160, 198 P.2d 318, 322 (1948), the court pointed out that, "[t]he district attorney or his deputies may properly appear before the grand jury, upon request of the grand jury, or otherwise, to give advice or to interrogate witnesses. Likewise, the attorney general is empowered to procure counsel to present evidence in a matter under investigation before the grand jury." In Stern v. Superior Court, 78 Cal. App. 2d 9, 177 P.2d 308 (1947), the district attorney and some of his assistants were with the grand jury at times in the absence of the reporter. The court held that the "grand jury is entitled to the legal advice of the district attorney . . . and the law does not require the presence of a reporter while such advice is being given . . . ." *Id.* at 13, 177 P.2d at 310.

57. Comment, *The Nature of the California Grand Jury: An Evaluation*, 2 SANTA CLARA LAW. 72, 76 (1962). The role of the district attorney in presenting the evidence and advising the grand jury on its admissibility is somewhat analogous to a juvenile court referee presenting and examining witnesses and ruling on the admissibility of their testimony. The latter procedure has been held contrary to due process. *In re* Ruth H., 26 Cal. App. 3d 77, 102 Cal. Rptr. 534 (1972); Gloria M. v. Superior Court, 21 Cal. App. 3d 525, 98 Cal. Rptr. 604 (1971); Lois R. v. Superior Court, 19 Cal. App. 3d 895, 97 Cal. Rptr. 158 (1971).

The prosecutor's responsibility in assuring that "none but legal evidence" is received by the grand jury is carried out in some counties by the district attorney asking all the questions with the jurors passing him written questions. Note, *Some Aspects of the California Grand Jury System*, 8 STAN. L. REV. 631, 645 n.129 (1956).

confront and cross-examine the witnesses against him. On the other hand, a defendant charged by information has all of these rights in addition to the fact that, unlike the grand jury indictment process, the evidence is judged by a neutral and detached magistrate capable of independently evaluating the admissibility of that evidence.

In this regard, the criticism voiced against the grand jury process during the 1878-79 California Constitutional Convention is noteworthy.[58] A number of speakers stressed that modification of the grand jury system had been actively espoused and generally supported in political meetings leading up to the convention.[59] The criticism voiced by a delegate named Mr. Huestis is still applicable today:

> But, Mr. Chairman, in order to get a more distinct idea of this matter, let us for a moment briefly consider the functions and duties of Grand Juries; and, as I understand it, their main duty is to examine the record of witnesses, or both, and come to a conclusion as to whether persons accused of crime ought to be tried or not. This they do under the advice of the District Attorney. In many cases they are, in whole or in part, composed of persons ignorant of the law; and in a majority of cases, if the District Attorney tells them that the evidence is sufficient to convict they indict, and on the contrary, if he tells them the evidence is not sufficient, they do not indict. They are, in the very nature of things, almost entirely under the control of the District Attorney, in all matters coming up in the Grand Jury room, and merely echo his opinions. The whole thing, then, practically viewed, merely amounts to a roundabout and very expensive method of getting the opinion of the District Attorney. And I submit that if this be necessary in order to insure the ends of justice, then, in the name of common sense, why not get the opinion of the District Attorney directly, and thus curtail the enormous expense attending the present system.[60]

Despite these critical sentiments and those expressed by other delegates as well, the unlimited availability of the indictment procedure and its arbitrary use as an alternative to prosecution by information persists to the present day.

A recent blatant example of arbitrary use of the grand jury procedure, aimed at avoiding the exercise of rights accorded to a defendant at a preliminary examination, was presented in *People v. Uhlemann*.[61] The defendant had been charged with the sale of marijuana. After a lengthy preliminary hearing at which the defendant presented evidence of entrapment, the magistrate sustained that defense and dis-

58. 1 DEBATES AND PROCEEDINGS OF THE STATE OF CALIFORNIA 308-17 (1880).
59. *Id.* at 311, 313.
60. *Id.* at 314.
61. 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973).

missed the charges. Thereupon, the district attorney presented his case to a grand jury and obtained an indictment. On appeal a majority of the California Supreme Court upheld this procedure over the vigorous dissent of Justices Mosk and Tobriner. The majority opinion rested its conclusion on the historic interpretation of California Penal Code Section 1387[62] allowing the prosecution to refile felony charges regardless of a dismissal by a magistrate.[63] Despite the obvious motive of the prosecutor to avoid extending to the defendant those procedural rights accorded him at the preliminary examination, the issue was not raised by the parties nor considered by the court.[64]

Such a deliberate prosecutorial circumvention of a magistrate's adverse ruling in a preliminary hearing is a practice of long standing. Even before the enactment of the constitutional provision authorizing alternative charging procedures, at a time when the preliminary hearing was utilized only as a detention procedure for later indictment, the practice of ignoring a magistrate's contrary ruling was bitterly criticized by a delegate to the Constitutional Convention of 1878-79.[65]

62. "An order for dismissal of the action . . . is a bar to any other prosecution for the same offense if it is a misdemeanor, but not if it is a felony. CAL. PEN. CODE § 1387 (West 1970).

63. 9 Cal. 3d at 666, 511 P.2d at 611, 108 Cal. Rptr. at 659.

64. In an amicus curiae brief, the California Public Defenders Association did raise this issue, which was briefly alluded to by Mr. Justice Mosk in a footnote to his dissenting opinion, indicating that it "touched on a sensitive nerve" and involved "provocative due process and equal protection problems." 9 Cal. 3d at 670 n.1, 511 P.2d at 614 n.1, 108 Cal. Rptr. at 662 n.1 (Mosk, J., dissenting). Although he did not consider this issue, Mr. Justice Mosk did raise another point urged by amicus, that the circumvention of the magistrate's order was a violation of the constitutional doctrine of separation of powers, CAL. CONST. art. I, § 1, as recently applied in Esteybar v. Municipal Court, 5 Cal. 3d 119, 485 P.2d 1140, 95 Cal. Rptr. 524 (1971) and People v. Tenorio, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970). People v. Uhlemann, 9 Cal. 3d 662, 676-77, 511 P.2d 609, 618-19, 108 Cal. Rptr. 657, 666-67 (1973) (Mosk, J., dissenting).

65. The delegate, an attorney named Barbour, described the following experience with this practice in a case in which he defended Denis Kearney and others on riot charges stemming from a meeting on San Francisco's Nob Hill: "[T]he District Attorney, for his own purposes . . . can make an engine of oppression out of that very institution [the grand jury]. I myself was concerned, and these delegates elected from San Francisco, in a case that distinctly illustrates that proposition. Denis Kearney, Dr. O'Donnell, Wellock, and various parties, as is well known, were arrested in San Francisco upon numerous charges. Among other charges preferred against them was one that they had committed a riot, by holding a meeting on Nob Hill, within the sacred precincts of the magnates of the railroad corporation. They were taken before a committing magistrate. It was fully examined before the committing magistrate. I myself appeared as one of the associate counsel for the defense, and after a full and complete examination of the foundationless and groundless charge against these men he discharged them. Now he did not send it before the Grand Jury. That ought to

The distinction between the procedures for prosecution by indictment and prosecution by information in regard to the rights accorded to the accused obviously placed one charged by indictment at a considerable disadvantage. Yet, there has never been a judicial or legislative determination which has attempted to define a basis for discriminating between those who are and those who are not accorded these important rights. The decision to proceed by grand jury indictment, and thus deny the accused these fundamental rights, is left entirely to the absolute discretion of the district attorney.[66]

## The Equal Protection—Due Process Issue

The arbitrary discrimination permitted under present law raises a serious constitutional question in light of principles recently recognized and applied by the California Supreme Court in the enforcement of the equal protection and due process provisions of the United States Constitution. While recognizing that absolute equality is not required and that differences may exist so long as an invidious discrimination does not occur, the court has viewed the " 'concept of the equal protection of the laws [as compelling] recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment.' "[67]

have been the end of that charge. What happened? Hostility existed between the magistrate and the District Attorney. After the sitting of the next Grand Jury the District Attorney presents that very identical case, that very identical charge, in the shape of an indictment, before the very identical Court which had discharged them. They were compelled to undergo the expense of a trial all over again about the very identical matter, and which resulted in the fiasco, the history of which is well known. 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 312 (1880).

66. A 1963 survey of several large district attorney offices in Northern California reveals the variety of reasons given by district attorneys for avoiding the preliminary examination process: "(1) when the accused has evaded apprehension and the statute of limitations would bar an information requiring the presence of the accused; (2) when the district attorney desires to avoid premature cross-examination of emotional or reluctant witnesses; (3) when there is great public interest in the case and the district attorney, for political reasons, desires to share responsibility for prosecution with the grand jury; (4) when the investigative powers of the grand jury are useful, as in complex fraud cases or those involving corruption in public office, and (5) when the district attorney believes that employing the grand jury would be speedier than using preliminary examination procedures, as in cases involving multiple defendants or offenses." Comment, *The California Grand Jury—Two Current Problems,* 52 CALIF. L. REV. 116, 118 (1964) (footnotes omitted).

In light of People v. Uhlemann, 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973) and the case described by delegate Barbour, see note 64 *supra,* to these may be added cases in which the magistrate has dismissed charges at a preliminary examination due to the presentation of evidence by a defendant.

67. *In re* Antazo, 3 Cal. 3d 100, 110, 473 P.2d 999, 1005, 89 Cal. Rptr. 255,

The appropriate tests for determining whether an invidious discrimination has occurred have been described by the court as follows:

> The traditional test has been that the "distinction drawn by a challenged statute must bear some rational relationship to a legitimate state end and will be set aside as violative of the Equal Protection Clause only if based on reasons totally unrelated to the pursuit of that goal." But a stricter standard has been prescribed in cases involving "suspect classifications" or "fundamental interests." In *Westbrook v. Mihaly*, [2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970)] the [occasion was offered] to epitomize the standards to be applied in evaluating classifications under the equal protection clause: "As the California Supreme Court has previously noted the United States Supreme Court has tended to employ a two-level test in reviewing legislative classifications under the Equal Protection Clause. In the area of economic regulation, the high court has exercised restraint, investing legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose. On the other hand, in cases involving "suspect classifications" or touching on "fundamental interests," the court has adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny. Under the strict standard applied in such cases, the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.[68]

The discrimination which results from the choice of a grand jury indictment as opposed to prosecution by information undoubtedly touches on fundamental interests, such as the right to assistance of counsel, the right to confront witnesses and the right to present evidence.[69] Accordingly, the "strict standard" would be applicable, placing upon the state "the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by law are *necessary* to further its purpose."[70]

The legislature has made no effort to establish any standards to distinguish between accused persons who are or are not entitled to a preliminary examination; the power to make that determination has been lodged entirely with the district attorney. His decision to pro-

261 (1970), *quoting* Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 578, 456 P.2d 645, 653, 79 Cal. Rptr. 77, 85 (1969).

68. *In re* Antazo, 3 Cal. 3d 100, 110-11, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970).

69. *See, e.g.*, Coleman v. Alabama, 399 U.S. 1, 9-10 (1970); Jennings v. Superior Court, 66 Cal. 2d 867, 428 P.2d 304, 59 Cal. Rptr. 440 (1967).

70. Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971); *In re* Antazo, 3 Cal. 3d 100, 111, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970).

ceed by grand jury may be motivated solely by his desire to foreclose the accused from obtaining an examination before a magistrate and from exercising the fundamental rights accorded therein. As noted above, district attorneys have cited a number of typical reasons for using the grand jury process as an alternative to the preliminary examination.[71] Of these, only one can be considered necessary to the compelling interest of enforcement of the criminal law, the tolling of the statute of limitations in the case of a suspect who has fled the jurisdiction of the court. In regard to the other reasons cited, no necessity would appear to justify denying the fundamental procedural rights which are accorded to persons prosecuted by information.

**Past Decisions**

In *People v. Sirhan*,[72] the California Supreme Court rejected a contention that prosecution by indictment violated equal protection and due process. But the issue was given only cursory consideration. Furthermore, unlike *People v. Uhlemann*,[73] the issue did not arise in a factual context which depicted the procedure's potential for discriminatory abuse. There was no initial effort by the prosecution to proceed by complaint and preliminary examination and then to circumvent arbitrarily the preliminary examination procedure, thus cutting off the defendant's rights to confront and present witnesses. In *Sirhan*, selection of the grand jury process could well be justified from the standpoint of protecting the defendant's personal safety in view of the great public furor directed against him. This issue, one of many, was summarily resolved by the conclusionary statement that "a defendant who is proceeded against by an indictment is not denied due process or equal protection,"[74] which was followed by the citation of several California Court of Appeal decisions.[75]

71. See note 66 *supra*.

72. 7 Cal. 3d 710, 497 P.2d 1121, 102 Cal. Rptr. 385 (1972).

73. 9 Cal. 3d 662, 511 P.2d 609, 108 Cal. Rptr. 657 (1973).

74. 7 Cal. 3d at 746-47, 497 P.2d at 1146, 102 Cal. Rptr. at 410.

75. In People v. Flores, 276 Cal. App. 2d 61, 65, 81 Cal. Rptr. 197, 200 (1969) the contention was denied on the basis that defendant had not cited any authority. In People v. Newton, 8 Cal. App. 3d 359, 388, 87 Cal. Rptr. 394, 412 (1970) the argument was rejected on the basis of the *Flores* decision. In People v. Pearce, 8 Cal. App. 3d 984, 989, 87 Cal. Rptr. 814, 817 (1970) it was turned down because "[t]he defendant had not claimed or presented facts to support the inference that the indictment procedure was chosen in his case due to some arbitrary or purposeful act on the part of some state official." In *In re* Wells, 20 Cal. App. 3d 640, 649, 98 Cal. Rptr. 1, 5-6 (1971) the court summarily rejected the argument citing *Pearce, Newton* and *Flores*.

Only in People v. Rojas, 2 Cal. App. 3d 767, 771, 82 Cal. Rptr. 862, 864-65

The crucial omission in the *Sirhan* ruling was the lack of any effort to apply the court's invidious discrimination test for determining an equal protection violation involving suspect classifications or fundamental interests as articulated in *In re Antazo*[76] and *Serrano v. Priest.*[77] The court merely made brief reference to several earlier United States Supreme Court decisions on discriminatory classifications involving race, indigency or type of offense,[78] brushing these aside as not relevant to the provisions in question.

**Analogous Precedents**

Despite the *Sirhan* ruling, the conclusion that the indictment process does violate due process and equal protection is clearly supported by several recent California and federal decisions. *In re Gary W.*[79] and *In re Franklin,*[80] are two California Supreme Court decisions involving procedural discriminations in which, unlike *Sirhan*, the *Antazo-Serrano* test was applied, resulting in the declaration of an equal protection-due process violation.

The issue in *Gary W.* concerned the constitutionality of a California statute which denied the right to a jury trial for Youth Authority wards in proceedings to determine whether they should remain subject to the control of the authority beyond the normal discharge date based on the authority's determination that the discharge would be dangerous to the public.[81] Referring to the statutes allowing trial by jury for confinement of other dangerous types,[82] the court recognized that the state may not "arbitrarily accord privileges to or impose disabilities upon one class unless some rational distinction between those included in and those excluded from the class exists."[83] While allowing that any rational connection between the distinctions and the legitimate

(1969) did the court concede that a defendant is denied procedural constitutional rights by the indictment process, but nevertheless overruled the equal protection claim because of the historic origin and past approval of the grand jury system.

76. 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

77. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

78. 7 Cal. 3d at 747, 497 P.2d at 1146, 102 Cal. Rptr. at 410, *citing* McLaughlin v. Florida, 379 U.S. 184 (1964); Douglas v. California, 372 U.S. 353 (1963); Skinner v. Oklahoma, 316 U.S. 535 (1942).

79. 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).

80. 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972).

81. CAL. WELF. & INST'NS CODE § 1800 (West 1972).

82. *Id.* §§ 3050, 3051, 3108 (narcotics addict); *id.* § 5303 (imminently dangerous mentally ill persons); *id.* § 5350(d) (West Supp. 1973) (gravely disabled person); *id.* § 6318 (West 1972) (mentally disordered sex offender).

83. 5 Cal. 3d at 303, 486 P.2d at 1207, 96 Cal. Rptr. at 7.

purpose of a statute will normally suffice, the court distinguished those statutes which affect fundamental interests, placing upon the state the burden of establishing the existence of a compelling interest and the need for a class distinction to further that interest.[84]

A similar conclusion was reached in *In re Franklin*.[85] Relying upon *Gary W.*, the court ruled that equal protection and due process required that persons committed after being found not guilty by reason of insanity under Penal Code,[86] were entitled upon request to trial by jury to determine their fitness for release. This was justified on the ground that trial by jury was afforded to other persons committed as mentally ill under the civil commitment statutes and no basis was shown for distinguishing between the two categories.

In the above decisions, the California Supreme Court relied upon the United States Supreme Court's ruling in *Baxstrom v. Herold*.[87] In that case, a state prisoner had been involuntarily committed for mental illness near the end of his prison term without a jury trial even though such trials were afforded to all other persons civilly committed. In declaring this procedure unconstitutional, the Court observed that

> [t]he State, having made this substantial review proceeding generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some.
>
> . . . Equal protection does not require that all persons be dealt with identically, but it does require that a distinction made have some relevance to the purpose for which classification is made. . . . For purposes of granting judicial review before a jury of the question whether a person is mentally ill and in need of institutionalization, there is no conceivable basis for distinguishing the commitment of a person who is nearing the end of a penal term from all other civil commitments.[88]

The same reasoning seems equally applicable to the judicial procedures leading to a determination of whether a person's liberty is to be placed in jeopardy in a criminal prosecution.

More recently, the United States Supreme Court has had occasion to apply the *Baxstrom* ruling in two unanimous and highly pertinent

84. *Id.* at 306, 486 P.2d at 1209, 96 Cal. Rptr. at 9, *citing In re* Antazo, 3 Cal. 3d 100, 110-11, 473 P.2d 999, 1005, 89 Cal. Rptr. 255, 261 (1970); Castro v. State, 2 Cal. 3d 223, 234-36, 466 P.2d 244, 251-53, 85 Cal. Rptr. 20, 27-29 (1970); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 578-79, 456 P.2d 645, 653-54, 79 Cal. Rptr. 77, 85-86 (1969).

85. 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972).

86. CAL. PEN. CODE § 1026 (West 1970).

87. 383 U.S. 107 (1966).

88. *Id.* at 111-12.

decisions, *Jackson v. Indiana*[89] and *Humphrey v. Cady*.[90] In *Jackson*, the Supreme Court declared that Indiana's statutory commitment procedures for accused persons found to be mentally ill and unable to comprehend the proceedings against them violated equal protection and due process because they established a more lenient commitment standard and a more stringent release standard than those applicable to other persons civilly committed. In *Humphrey*, the Court reversed a summary denial of habeas corpus and remanded for hearing a state prisoner's claim that the extension of his term of commitment on a finding that he was a dangerous sex offender violated equal protection and due process because he was not accorded trial by jury and other procedural rights given to persons civilly committed. The following statement from the opinion delivered by Mr. Justice Marshall is especially pertinent to the present subject:

> The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections, *merely by arbitrary decision of the State to seek his commitment under one statute rather than the other.*[91]

Clearly, a defendant who is indicted rather than prosecuted by information following a preliminary hearing is deprived of fundamental procedural rights "merely by arbitrary decision of the state to seek his commitment under one statute rather than another."

## A Suggested Remedy

The *Franklin* and *Gary W.* decisions suggest a remedy for correcting the present inequity of the indictment process. Those rulings imposed a requirement of trial by jury where the legislature has not so provided. Similarly, the legislature has not provided for a preliminary examination as part of the indictment process, despite authorization to do so under the state constitution.[92] Accordingly, the equal protection-due process defect could be readily corrected by merely requiring that in cases of prosecution by indictment, a defendant be allowed a preliminary examination upon request. Such examination

89. 406 U.S. 715 (1972).

90. 405 U.S. 504 (1972).

91. *Id.* at 512 (emphasis added).

92. The California Constitution allows for that procedure at the Legislature's option: "Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by a magistrate, or *by indictment, with or without such examination and commitment*, as may be prescribed by law." CAL. CONST. art. 1, § 8 (emphasis added).

could be conducted after indictment and prior to trial before a judge of the Superior Court acting as a magistrate, as allowed under Penal Code.[93]

A similar procedural requirement was recently imposed by the Michigan Supreme Court in *People v. Duncan*.[94] The defendant had contended that his equal protection-due process rights had been violated by not according him a preliminary examination. The court deliberately avoided the constitutional question. Instead, in the exercise of its supervisory authority over lower court procedures, the court did order that preliminary hearings be granted in all indictment cases where requested prior to trial. This was justified on the basis of the modern efficiency of the preliminary examination process and the inequities of the grand jury process.[95]

The requirement of an optional preliminary examination in indictment cases is not likely to cause a significant burden upon the courts because the indictment procedure is utilized in only a small percentage of cases. During 1971 only 2,889 or 4.1 percent of the 70,663 Superior Court felony filings were prosecuted by indictment.[96] Furthermore, such preliminary hearings may result in a greater number of dismissals or settlements without trial because of prosecutors being persuaded after cross-examination of their witnesses that their cases are weak or because of defendants being convinced after confronting the witnesses against them that they ought to plead guilty.[97] Such hearings may result also in submissions on the evidence presented, without further trial, as is done with submissions on preliminary examination transcripts which occurs in nearly 75 percent of the trials held in Los Angeles County.[98] Excellent precedent exists for judicial im-

93. CAL. PEN. CODE § 808 (West 1970).

94. 388 Mich. 489, 201 N.W.2d 629 (1972).

95. *See id.* at 499-502, 201 N.W.2d at 633-35.

96. BUREAU OF CRIMINAL STATISTICS, CALIF. DEP'T OF JUSTICE, CRIME & DELINQUENCY IN CALIFORNIA 42 (1971).

97. A similar change of procedure in Florida pursuant to a federal court ruling requiring preliminary hearings to support the filing of an information recently resulted in an estimated 20 to 25 percent reduction in felony caseloads in one Judicial Circuit of that state. Pugh v. Rainwater, 483 F.2d 778, 787 (5th Cir. 1973).

98. Graham & Letwin, *The Preliminary Hearing in Los Angeles: Some Field Findings and Legal-Policy Observations*, 18 U.C.L.A.L. REV. 916, 931 (1971). The efficacy of the preliminary examination and its unrealized potential are discussed by Professors Graham and Letwin in their extensive study of the procedure in Los Angeles County. Contrary to earlier forecasts that the preliminary examination would place tremendous power in the hands of the prosecutor, they conclude that "the preliminary hearing may well be the most important procedural mechanism in the administration

position of such a procedural requirement to conform the indictment process to constitutional standards. As noted above, recent California Supreme Court decisions now require trial by jury for dangerous Youth Authority offenders and for insane offenders.[99]

In addition, there is the example of a judicial remedy to correct constitutionally defective procedures fashioned in the United States Supreme Court's recent decision in *Morrissey v. Brewer*.[100] In an opinion delivered by Chief Justice Burger the Court imposed upon the states a due process requirement that, in parole revocation cases, parolees must be afforded the right to both preliminary hearings and formal revocation hearings. The procedural requirements for these hearings, as set out in the *Morrissey* opinion, are detailed and substantial. A parolee must be given prior notice of the preliminary hearing and be afforded the opportunity to present relevant information and to question adverse informants.[101] There must be a hearing officer who is an "uninvolved person" and he must make a summary or digest of the hearing and state the reasons for a finding of probable cause to hold the parolee.[102] More formal proceedings are required for the final revocation hearing, including written notice, confrontation and cross-examination of witnesses, the right to present evidence, a neutral and detached hearing body and a written statement of findings.[103] By comparison to this, the above proposal for modification of the indictment procedure to conform with settled standards of equal protection and due process seems quite modest.[104]

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of criminal justice in this County though few of the participants seem to have viewed it as such. By virtue of the procedural rules governing the hearing and its constitutional role as the successor to the grand jury, the magistrate in the preliminary is the only judicial officer with sufficient discretionary power to counterbalance the vast authority given the prosecutor." *Id.* at 953 (footnotes omitted).

99. *In re* Franklin, 7 Cal. 3d 126, 496 P.2d 465, 101 Cal. Rptr. 553 (1972); *In re* Gary W., 5 Cal. 3d 296, 486 P.2d 1201, 96 Cal. Rptr. 1 (1971).

100. 408 U.S. 471 (1972).

101. *Id.* at 486-87.

102. *Id.*

103. *Id.* at 489.

104. A similar modification of parole revocation procedures for narcotics addicts, requiring a *Morrissey*-type preliminary hearing for California Rehabilitation Center parolees, was imposed recently in *In re* Murillo, 35 Cal. App. 3d 71, — P.2d —, — Cal. Rptr. — (1973), wherein the court noted that *Morrissey* required a different view on this question than that previously taken in *In re* Marks, 71 Cal. 2d 31, 45-47, 453 P.2d 441, 451-52, 77 Cal. Rptr. 1, 11-12 (1969). In *Marks*, the California Supreme Court had rejected the claim that such a hearing was required, on the basis that "it is not . . . for the courts to revise such a 'creature of statute' . . . ." *Id.* at 46, 453 P.2d at —, 77 Cal. Rptr. at —.

## Conclusion

Felony suspects who desire to contest the existence of probable cause to support a formal accusation against them presently face a substantial handicap when accused by grand jury indictment as opposed to being accused by information. Under the latter procedure, they are entitled to the right to counsel, the right to confront witnesses and the right to present evidence—rights which protect fundamental interests at a critical stage of the proceedings.[105] Yet, those rights may be entirely denied in the absolute discretion of the district attorney to proceed by grand jury indictment in lieu of prosecution by information.

No compelling state interest is apparent to justify such discrimination. Because of the California Supreme Court's recently articulated equal protection-due process test for invidious discrimination[106] and the United States Supreme Court's recent expansion of due process requirements[107] in dealing with parole revocations, it would appear that a modification of this arbitrary power to prosecute by grand jury indictment sans preliminary hearing may soon be anticipated.

105. Coleman v. Alabama, 399 U.S. 1, 9-10 (1970); Jennings v. Superior Court, 66 Cal. 2d 867, 874-75, 428 P.2d 304, 309, 59 Cal. Rptr. 440, 445 (1967).

106. See text accompanying note 68 *supra*.

107. See text accompanying note 87-91 *supra*.